STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Michigan Court of Appeals)

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellee,

v

SC No. 153356
COA No. 326642
Bay Probate Court
LC No. 14-049740-CZ

RICHARD RASMER, Personal Representative of Estate of OLIVE RASMER,

Defendant-Appellant.
/

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DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153370
COA No. 323090
Huron Probate Court
LC No. 13-039597-CZ

In re Estate of IRENE GORNEY,

Defendant-Appellee.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153371
COA No. 323185
Calhoun Probate Court
LC No. 13-000992-CZ

In re Estate of WILLIAM B FRENCH,

Defendant-Appellee.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153372
COA No. 323304
Clinton Probate Court
LC No. 14-028416-CZ

In re Estate of WILMA KETCHUM,

Defendant-Appellee.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153373
COA No. 326642
Bay Probate Court
LC No. 14-049740-CZ

RICHARD RASMER, Personal Representative of Estate of OLIVE RAMSER,

Defendant-Appellee.

/

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DEFENDANT-APPELLANT ESTATE OF OLIVE RASMER'S BRIEF IN NO. 153356

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STATEMENT OF THE BASIS OF JURISDICTION

On July 24, 2014, Plaintiff-Appellee Department of Health and Human Services (DHHS) filed a notice of claim for estate recovery against Defendant-Appellant Estate of Olive Rasmer seeking the sum of $178,133.02 for Medicaid services provided to Olive Rasmer before her death on March 16, 2014. Defendant Estate filed a notice of disallowance of Plaintiff's claim on August 1, 2014. Thereafter, Plaintiff filed a complaint under MCR 5.101(C) in the Bay Probate Court seeking recovery of $178,133.02. (1a-6a). The Estate then filed a motion for summary disposition under MCR 2.116(C)(10) requesting that the DHHS' claim be denied (7a-29a). After a hearing on February 10, 2015 (30a-46a), the probate court granted the Estate's motion for summary disposition on February 18, 2015. (47a-50a). On March 30, 2015, the DHHS appealed.

Pursuant to orders entered on May 20 and 28, 2015, respectively, the Court of Appeals consolidated this case with three others involving the DHHS' estate recovery efforts against estates. On February 4, 2016, the full panel of the Court of Appeals reversed in part the probate courts' orders "to the extent they conflict with" *In re Estate of Keyes*, 310 Mich App 266 (2015), remanding for further proceedings, while the panel majority affirmed in part the probate court decisions in relation to recovery claims for sums expended between July 1, 2010 and the July 1, 2011 implementation of the estate recovery program. (51a-64a – *In re Estate of Irene Gorney*, (Jansen PJ, and Cavanagh and Gleicher, JJ) (Jansen, J, concurring in part, dissenting in part)

On March 15, 2016, pursuant to MCR 7.305(B)(2), (3) and (5)(a), Defendant Estate filed an Application for Leave to Appeal in this Court. On July 8, 2016, this Court granted the Estate's application. (65a-67a). Pursuant to 1963 Const art 6, § 4, MCL 600.212 , MCL 600.215(3), and MCR 7.303(B)(1), jurisdiction is fully vested in the Michigan Supreme Court to hear and resolve all the issues presented in this appeal.

STATEMENT OF THE QUESTIONS FOR REVIEW

I. **DOES MCL 400.112g-k PERMIT THE DHHS TO SEEK ESTATE RECOVERY FOR MEDICAID SERVICES PROVIDED TO AN INDIVIDUAL BEFORE THAT INDIVIDUAL RECEIVED NOTIFICATION OF THE ESTATE RECOVERY PROGRAM FROM THE DHHS?**

II. **DOES ESTATE RECOVERY FOR SUCH PRE-NOTIFICATION SERVICES CONSTITUTE A VIOLATION OF AN INDIVIDUAL'S SUBSTANTIVE AND/OR PROCEDURAL DUE PROCESS RIGHTS;**

III. **IS A CHALLENGE TO THE DHHS' ESTATE RECOVERY EFFORTS UNDER MCL 400.112g(4) SUBJECT TO JUDICIAL REVIEW?**

STATEMENT OF FACTS

A. Background Facts

The focus of this case is the Michigan Medicaid estate recovery program (MMERP), MCL 400.112g-k. In *Gorney*, the Court of Appeals observed:

> In 1993, Congress required states to implement Medicaid estate recovery programs. 42 USC 1396p(b). In 2007, the Michigan Legislature passed 2007 PA 74, which added MCL 400.112g though MCL 400.112k to the Michigan Social Welfare Act, MCL 400.1 *et seq*. This legislation empowered the DHHS to "establish and operate the Michigan Medicaid estate recovery program [MMERP] to comply with" 42 USC 1396p. MCL 400.112g(1). MCL 400.112g(5) required approval by the federal government before the MMERP would be "implement[ed]." Michigan finally received approval from the federal Centers for Medicare & Medicaid Services (CMS) for its program (referred to as a State Plan Amendment) on May 23, 2011, and the department circulated instructions to implement the plan on July 1, 2011. . . The CMS letter approved this State Plan Amendment in May 2011. The letter attached a form titled "Transmittal and Notice of Approval of State Plan Material." The form indicated that the CMS "received" Michigan's "Proposed Policy, Procedures, and Organizational Structure for Implementation" of a Medicaid estate recovery program on September 29, 2010, approved it on May 23, 2011, and, as to the CMS, deemed July 1, 2010 the "effective date" of Michigan's recovery program.
>
> In the current cases, the decedents began receiving Medicaid benefits after the September 30, 2007 passage of 2007 PA 74. It is undisputed that the initial Medicaid applications (form DHS-4574) filed by the decedents, or a personal representative on their behalves, contained no information about estate recovery. However, it is also undisputed that in order to remain entitled to Medicaid benefits, each applicant was required to resubmit a form DHS-4574 annually for a "redetermination" of eligibility. Each new DHS-4574 contained a section entitled "Acknowledgments," which the applicant certified that he or she "received and reviewed."
>
> At some point during 2012, all four decedents' personal representatives submitted a DHS-4574 as part of the redetermination process. Beginning in 2012, the acknowledgment section of the form included the following provision:
>
> > I understand that upon my death the Michigan Department of Community Health [now the DHHS] has the legal right to seek recovery from my estate for services paid by Medicaid. MDCH will not make a claim against the estate while there is a legal surviving spouse or a legal surviving child who is under the age of 21, blind, or disabled living in the home. An estate consists of real and personal property. Estate Recovery only applies to certain Medicaid recipients who received Medicaid services after the implementation date of the program. MDCH may

> agree not to pursue recovery if an undue hardship exists. For further information regarding Estate Recovery, call 1-877-791-0435.
>
> As with previous applications and redeterminations, each decedent's personal representative signed the statement affirming that he or she had received and reviewed the acknowledgments, which included the provision on estate recovery. [53a (Citations omitted)].

In the present case, Olive Rasmer began receiving Medicaid benefits in 2009 through the Michigan Department of Community Health (now the Department of Health and Human Services)("DHHS"). As the Court of Appeals noted, the DHHS failed to provide any written materials to Olive Rasmer about Michigan's Medicaid estate recovery program at the time of her enrollment in Medicaid. In fact, she did not become aware that the DHHS had the legal right to seek estate recovery until her authorized representative submitted her application for redetermination of Medicaid benefits on September 30, 2013.[1] Further, the acknowledgment section alerting Olive Rasmer to the DHHS legal right to seek recovery from her estate after her death for services paid by Medicaid occurred in the final paragraph of the multipage redetermination application. Olive Rasmer died on March 16, 2014 and her Will was offered to the Bay Probate Court on May 19, 2014.

B. Procedural Facts

On July 24, 2014, the DHHS filed a notice of claim in the Estate of Olive Rasmer seeking the sum of $178,133.02. The Estate of Olive Rasmer, through their attorney, Jim Thomas, filed a notice of disallowance of said claim on August 1, 2014, stating that Olive Rasmer had not received notice of estate recovery as required by MCL 400.112g(3)(e). As a result, the DHHS filed a complaint under MCR 5.101(C) seeking recovery of $178,133.02. (1a-6a). Because the

[1] In *Gorney*, the Court of Appeals states: "At some point during 2012, all four decedents' personal representatives submitted a DHS-4574 as part of the redetermination process." (53a). This is not correct in the case of Olive Rasmer, who submitted her application on September 30, 2013.

DHHS failed to provide Olive Rasmer with the required statutory notice at the time she applied for Medicaid benefits and was enrolled in the program, the Estate of Olive Rasmer filed a motion for summary disposition pursuant to MCR 2.116(C)(10) requesting that the DHHS' claim be denied. (7a-29a). Following a hearing on February 10, 2015 (30a-46a), Bay Probate Court Judge Dawn A. Klida issued an Opinion and Order on February 18, 2015, finding in favor of the Estate of Olive Rasmer:

> Olive Rasmer was enrolled in Medicaid with benefits in 2009 and received those benefits until her passing on March 16, 2014. At the time of her enrollment, she did not receive any written notice from the Plaintiff that her estate would be subject to recovery, as Michigan did not begin its notification until sometime in 2011.
>
> Ms. Rasmer's patient representative and daughter Gayle S. Dore completed an annual Medicaid redetermination application on September 30, 2013. This was the first verifiable notice of Medicaid recovery – at least four years after she enrolled and approximately four months prior to her death.
>
> Defendant/Estate argues that the notice requirements of the Michigan statute which enacted Medicaid were not complied with; specifically MCL 400.112g(3)(e) which requires that written materials explaining the process to apply for a waiver from estate recovery due to hardship, be provided "**at the time an individual enrolls in Medicaid** for long-term care services." Section (7) of MCL 400.112g requires the MDCH to provide written information . . . describing the provisions of the Michigan Medicaid estate recovery program, including, but not limited to, **a statement that some or all of their estate may be recovered**."
>
> Plaintiff asserts that the information contained in the annual Medicaid redetermination application, as well as fliers and booklets that were sent constituted adequate notice. Further, that the notice requirements under MCL 400.112g(3)(e) were never mandated. This Court disagrees.
>
> As stated by this Court's predecessor in In Re: The Estate of Esther Keyes, No. 13-49103CZ (Bay Co Prob Ct, January 9, 2014), "When the Michigan legislature codified the state's Medicaid recovery program under the Social Welfare Act, it did so with specific language setting forth the intent to advise Medicaid applicants**, at the time of enrollment**, of the [recovery] program and its implications." The Court found the notice to be inadequate stating further, "This Court finds that the terms of MCL 400.112g must be interpreted by their plain meaning, and that the legislature's clear intent when setting forth the provisions of adequate notice, should be followed." The facts of that case are remarkably similar to the facts of this case, and thus a similar result is

> appropriate. Therefore, this Court finds summary disposition in favor of the Defendant/Estate is also appropriate. [48a-50a (Emphasis in original)].

On March 13, 2015, the Bay Probate Court denied the DHHS' Motion for Reconsideration. (68a-75a – Register of Actions).

On March 30, 2015, the DHHS appealed to the Court of Appeals, and this case was consolidated with the appeals in the three other cases involving estate recovery of Medicaid long-term care benefits. In a published split-decision authored by Judge Gleicher in *In re Estate of Irene Gorney*, (Jansen, J, concurring in part, dissenting in part) on February 4, 2016 [COA Nos. 323090, 323185, 323304, 326642], the Court of Appeals affirmed in part and reversed in part, remanding for further proceedings. (51a-64a). Specifically, the full panel of Court of Appeals (Jansen PJ, and Cavanagh and Gleicher, JJ) reversed in part the probate court decisions denying the DHHS' collection efforts, ruling that the DHHS complied with state statutory notice requirements as well as state and federal constitutional due process requirements when the DHHS informed the decedents of estate recovery provisions stated in the Michigan Medicaid estate recovery program [MMERP], MCL 400.112g-k, in their annual "redetermination" applications, not when the decedents had initially enrolled in the Medicaid program, as the Estates argued. (52a). In reversing the probate courts' orders in these respects, the Court of Appeals maintained that these statutory notice and due process issues were already raised and decided in *In re Estate of Keyes*, 310 Mich App 266 (2015), lv den 498 Mich 968 (2016). (52a, 53a-54a). Being bound by *Keyes* pursuant to MCR 7.215(J)(1), the Court of Appeals concluded that MCL 400.112g(3)(e) and MCL 400.112g(7) provided them with sufficient statutory notice of the estate recovery program when filing an application for redetermination of Medicaid eligibility. (55a-56a). In *Gorney*, the Court of Appeals thus held that *Keyes* controlled the issue that procedural due process under the federal and state constitutions was not violated on the

ground that the Estates were not given notification of estate recovery at the time of enrollment in the Medicaid program. (57a-58a).

The Court of Appeals also addressed the Estate of Ketchum's claim that "the DHHS sought recovery in violation of MCL 400.112g(4), which precludes the department from 'seek[ing] Medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state." (56a). The Court of Appeals found, however, that "[t]he Legislature did not direct the DHHS to act 'at its sole discretion' and we located no DHHS publication describing how such determinations are made." (56a). The Court of Appeals further noted "[t]hat the cost-effectiveness decision is made at the department's 'sole discretion' does not preclude all judicial review." (57a).

On the other hand, the panel majority (Cavanagh and Gleicher, JJ) affirmed in part the probate court orders relating to recovery claims for sums expended between July 1, 2010, and the July 1, 2011 implementation of the MMERP," finding that such collection by "the DHHS would violate MCL 400.112g(5) and the decedents' rights to due process by taking property to cover a Medicaid 'debt' incurred before the program creating the debt was approved and implemented." (53a). Specifically, the panel majority agreed with the respective Estates' claims that the DHHS violated their substantive due process rights guaranteeing the protection of their property interests by retroactively applying the MMERP beginning on July 1, 2010 (the date of approval), rather than on July 1, 2011 (the date of implementation). (58a-60a).

On March 15, 2016, pursuant to MCR 7.305(B)(2), (3) and (5)(a), Defendant-Appellant Richard Rasmer, Personal Representative of the Estate of Olive Rasmer, filed a timely Application for Leave to Appeal in this Court. On July 8, 2016, this Court granted the Estate's application. *In re Estate of Olive Rasmer*, MSC No. 153356. (65a-67a).

INTRODUCTION

In 1965, Congress enacted Title XIX of the Social Security Act, establishing the Medicare and Medicaid programs. 42 USC § 1396 *et seq*. Medicaid and Medicare were created as part of President Lyndon Baines Johnson's "Great Society" program to address the health needs of the American people. Specifically, Medicaid is a medical assistance program that provides services and support to millions of people, including those who are elderly and disabled, "who cannot afford to cover their own medical costs." *Hughes v McCarthy*, 734 F3d 473, 475 (CA6 2013)(citing 42 USC § § 1396-1396w-5); *Harris v McRae*, 448 US 297, 301 (1980); *Mackey v Dep't of Human Servs*, 289 Mich App 688, 693 (2010). "This statute created a cooperative program in which the federal government reimburses state governments for a portion of the costs to provide medical assistance to low-income individuals." *Id.* Thus, the federal government and the states fund Medicaid jointly, with the federal government "matching" state Medicaid expenditures according to a formula based upon the state's average personal income relative to the national average. States are not required to participate in Medicaid, but those that do so must structure and administer their plans in compliance with the Medicaid statute and federal regulations. 42 USC § 1396a(a)(10). In other words, States voluntarily participate in the program and must adopt plans that comply with the requirements imposed by the Act itself and Health and Human Services' regulations. *Wilder v Va Hosp Ass'n,* 496 US 498, 502 (1990).

After more than 50 years, it is well-settled that Medicaid offers the "States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions" and the statute's implementing regulations. *Armstrong v Exceptional Child Ctr., Inc*, 135 S Ct 1378, 1382 (2015); 42 USC § 1396a; 42 CFR § 430.15. While States have wide discretion in administering their Medicaid programs for which

they receive substantial federal contributions, it is qualified by its mandate to adhere to federal statutes and regulations. *King v Smith*, 392 US 309, 317 (1968). As explained by the United States Supreme Court in *Schweiker v Gray Panthers*, 453 US 34, 36-37 (1981):

> Each participating State develops a plan containing "reasonable standards . . . for determining eligibility for and the extent of medical assistance." 42 USC § 1396a(a)(17). An individual is entitled to Medicaid if he fulfills the criteria established by the State in which he lives. State Medicaid plans must comply with requirements imposed both by the Act itself and by the Secretary of Health and Human Services (Secretary). See § 1396a (1976 ed. and Supp. III).

Thus, to implement the program, '[e]ach participating State develops a plan containing reasonable standards . . . for determining eligibility for and the extent of medical assistance within the boundaries set by the Medicaid statute[s] and the Secretary of Health and Human Services [HHS].'" *Wis Dep't of Health & Family Servs v Blumer*, 534 US 473, 479 (2002). Accordingly, the administration of the Medicaid program under federal law requires that Michigan's Medicaid program be "no more restrictive" than what is allowed by federal law. 42 USC § 1396a(a)(10)(C)(i). "No more restrictive" is defined in the statute to mean "additional individuals may be eligible for such assistance." Accordingly, the Medicaid statute allows states to confer eligibility upon a broader pool of applicants than what is required under federal law.

In 1993, Congress passed the Omnibus Budget Reconciliation Act ("OBRA") requiring States to implement Medicaid estate recovery programs, 42 USC § 1396p(b), directing them to attempt to recover payments made to healthcare providers on behalf of a Medicaid recipient from the recipient's estate after his or her death. In 2007, the Michigan Legislature passed 2007 PA 74, which added MCL 400.112g through MCL 400.112k to the Michigan Social Welfare Act, MCL 400.1 *et seq.*, which authorized the DHHS to "establish and operate the Michigan Medicaid estate recovery program [MMERP] to comply with [42 USC 1396p]." MCL 400.112g(1). MCL 400.112g(5) required approval by the federal government before the estate

recovery program would be implemented. Thus, Michigan's Medicaid estate recovery program must operate in accordance with the Medicaid statute and federal regulations and comply with procedural and substantive due process under the state and federal constitutions. See *Goldberg v Kelly*, 397 US 254 (1970).

SUMMARY OF THE ARGUMENT

In the case of the Estate of Olive Rasmer, the Court of Appeals in *Gorney* erred in following *Keyes'* holding that the DHHS complied with state statutory notice requirements, as well as procedural due process requirements under state and federal constitutions when the DHHS informed Olive Rasmer of the estate recovery program only in the acknowledgment section on the final page of the "redetermination" application submitted on September 30, 2013. Specifically, the DHHS failed to administer the estate recovery program under MCL 400.112g-k in accordance with the statutory notice provisions set forth in MCL 400.112(g)(3)(e) and (7) and the constitutional dictates of procedural and substantive due process under the state and federal constitutions. First, properly interpreted, the DHHS failed to comply with the state statutory notice provisions that required the agency to provide Olive Rasmer with written notice describing the provisions of the estate recovery program and what actions may be taken against her estate after her death at the time she applied for enrollment in the Medicaid program for long-term care services in 2009. Specifically, contrary to the decision in *Keyes* upon which *Gorney* erroneously relied, MCL 400.112g(3)(e) and MCL 400.112g(7) should be interpreted harmoniously to require the DHHS to provide such written notice at the time of enrollment in the Medicaid program. Such an interpretation is required by the CMS' *State Medicaid Manual*, § 3810(g)(1), in compliance with 42 USC § 1396p, as well as the doctrine of constitutional avoidance.

Second, the DHHS violated procedural due process under US Const, am XIV and 1963 Const, art 1, § 17, by not providing Olive Rasmer with timely and reasonably sufficient written notice describing the provisions of the estate recovery program and what actions may be taken against her estate after her death at the time she applied for enrollment in the Medicaid program for long-term care services. In particular, the DHHS' purported notice in the acknowledgment section at the end of a long multipage Medicaid redetermination application was neither "timely" nor "reasonably sufficient" because it fails to describe with any specificity the provisions of the Michigan estate recovery program and what actions the agency may take against an estate after the Medicaid beneficiary's death. Here, *Gorney* wrongly relied upon the *Keyes*' decision interpreting the state statutory notice provisions as sufficient for the purposes of due process.

Third, the DHHS violated substantive due process under US Const, am V and am XIV and 1963 Const, art 1, § 17, by retroactively applying Michigan's estate recovery program to Olive Rasmer because the agency did not provide her with timely and reasonably sufficient written notice describing the provisions of the estate recovery program and what actions may be taken against her estate after her death at the time she applied for enrollment in the Medicaid program for long-term care services in violation of due process. Although the panel majority in *Gorney* correctly concluded that the DHHS' retroactive application of the estate recovery program violated their substantive due process rights under the state and federal constitutions, they erred because the DHHS could not seek estate recovery from the Estate of Olive Rasmer since Olive Rasmer had not been provided with timely and reasonably sufficient written notice, at the time of her enrollment in the Medicaid program, describing the provisions of the estate recovery program and what actions may be taken against her estate after her death.

Finally, the Court of Appeals properly found that the DHHS' cost-effectiveness decisions under MCL 400.112g(4) do not preclude judicial review. Specifically, the DHHS' determinations of cost-effectiveness when implementing the estate recovery program are subject to judicial review, pursuant to 1963 Const art VI, and the Michigan Administrative Procedures Act, MCL 24.306, or, alternatively, the Revised Judicature Act, MCL 600.631.

APPELLATE STANDARDS OF REVIEW

This Court applies various standards of review to this case. First, this Court reviews questions of constitutional law de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277 (2013).

Second, issues of statutory interpretation are also reviewed de novo. *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 57 (2014). "The goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Id.* at 59 (quotation marks and citation omitted). Statutes are interpreted as a whole, and words or phrases are interpreted in consideration of their context and purpose in the statutory scheme. *Id.* Thus, "words and phrases used in an act should be read in context with the entire act and assigned meanings as to harmonize with the act as a whole, and a word or phrase should be given meaning by its context or setting." *Hannay v Dept of Transp*, 497 Mich 45, 57 (2014). When a statute is ambiguous such that "reasonable minds could differ with respect to its meaning, judicial construction is appropriate to determine its meaning." *Peterson v Magna Corp*, 484 Mich 300, 328 (2009), quoting *In re MCI Telecom Complaint*, 460 Mich 396, 411-412 (1999).

Third, pursuant to 1963 Const, art 6, § 28, the standard of review for a judicial or quasi-judicial administrative agency action is whether it is "'authorized by law'" and its factual findings are "'supported by competent, material and substantial evidence on the whole record.'" *Viculin v*

Dep't of Civil Serv, 386 Mich 375, 384 (1971), quoting Const 1963, art 6, § 28; see also *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 97 (2011) (holding that "the Michigan Constitution guarantees judicial review . . . and this guarantee may not be jettisoned by statute").

Finally, this Court reviews de novo the trial court's decision on a motion for summary disposition. *Elba Twp, supra.* A party is entitled to summary disposition under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law."

ARGUMENT

I. MCL 400.112g-k SHOULD BE INTERPRETED TO REQUIRE THE DHHS TO PROVIDE WRITTEN NOTICE DESCRIBING THE PROVISIONS OF THE ESTATE RECOVERY PROGRAM AND WHAT ACTIONS MAY BE TAKEN AGAINST AN INDIVIDUAL'S ESTATE AT THE TIME THE INDIVIDUAL ENROLLS IN THE MEDICAID PROGRAM FOR LONG-TERM CARE SERVICES.

The question before this Court is whether MCL 400.112g-k permit the DHHS to seek estate recovery for Medicaid long-term care services provided to an individual before that individual received proper written notification of the estate recovery program from the DHHS. In *Gorney*, the Court of Appeals found that the issue was decided in *Keyes*, which concluded that "MCL 400.112g(7) allows the Department to engage in estate recovery when the individual has sought Medicaid benefits after being provided with a notice regarding estate recovery" and that "MCL 400.112g(3)(e) did not require the Department to provide this notice when [that individual] enrolled in Medicaid." *Keyes, supra*, 310 Mich App at 273-274. *Keyes*, however, was wrongly decided, as the state statutory notice provisions at issue should be interpreted harmoniously to require the DHHS to provide written notice describing the provisions of the

estate recovery program and what actions may be taken against an individual's estate at the time the individual enrolls in the Medicaid program for long-term care services.[2]

Specifically, in *Gorney*, the Court of Appeals stated in pertinent part:

> The estates challenged the adequacy and effectiveness of the notice provided in the final paragraph of the multipage redetermination application. The notice provisions of the MMERP are found at MCL 400.112g(3)(e) and 400.112g(7), and instruct:
>
> * * *
>
> (3) The department of community health shall seek appropriate changes to the Michigan medicaid state plan and shall apply for any necessary waivers and approvals from the federal centers for medicare and medicaid services to implement the [MMERP]. The department of community health shall seek approval from the federal centers for medicare and medicaid regarding all of the following:
>
> * * *
>
> (e) Under what circumstances the estates of medical assistance recipients will be exempt from the [MMERP] because of a hardship. At the time an individual enrolls in medicaid for long-term care services, the department of community health shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship.
>
> * * *
>
> (7) The department of community health shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the [MMERP], including, but not limited to, a statement that some or all of their estate may be recovered.

In *Keyes*, 310 Mich App at 272-273, this Court examined these provisions and held:

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[2] In deciding this case, it must be kept uppermost in mind at all times that the "individual" in question refers not to an undefined, abstract someone, but usually to a person of advanced years, frail or in failing health, or someone with disabilities. As observed by Clinton Probate Court Judge Lisa Sullivan in *In re Estate of Kathryn M Salemka-Shire*, No. 11-127599 (2012):

> "Finally, as a matter of public policy, individuals seeking Medicaid benefits are usually of limited means and medically fragile. They are turning to the state as a payer of last resort for their immediate health care and are vulnerable to decisions of [sic] duress. [81a)].

> We conclude that the timing provision of MCL 400.112g(3)(e) does not apply in this case. MCL 400.112g(3)(e) provides that "[a]t the time an individual enrolls in medicaid for long-term care services, the department of community health shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship." Read in isolation, this provision appears to support the estate's position. But we may not read this provision in isolation. [*State ex rel.] Gurganus [v CVS Caremark Corp.*], 496 Mich [45, 61; 852 NW2d 103 (2014)].
>
> Subsection (3)(e) is part of the larger Subsection (3), which requires the Department to seek approval from the federal government regarding the items listed in the subdivisions. In this case, [as in the current appeals], the estate does not assert that the Department failed to seek approval from the federal government concerning the estate recovery notice. Rather, the estate asserts that it did not personally receive a timely notice.
>
> The Act contains a second provision concerning notice, and this provision has different language. MCL 400.112g(7) provides that "[t]he department of community health shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the [MMERP], . . ." When the Legislature includes language in one part of a statute that it omits in another, this Court presumes that such an omission was intentional. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005). Subsection (7) applies to the estate's case because the estate alleges that [the decedent] did not receive sufficient notice of estate recovery. Subsection (7)'s language is similar to that in Subsection (3)(e), but there is one major difference – timing. Subsection (3)(e) states "at the time an individual enrolls in medicaid," while Subsection (7) states that the Department must provide a notice when an individual "seek[s] medicaid eligibility[.]" We presume the Legislature's decision not to use the word "enrollment" in Subsection (7) was intentional.

The facts underlying the current matters are largely indistinguishable from those underlying *Keyes*. Ms. Keyes also first enrolled in Medicaid sometime after September 30, 2007, and was not notified at that time of the estate recovery program. Just as in the current appeals, Ms. Keyes' personal representative did not receive notice of the recovery program until filing an application for redetermination of eligibility in 2012. Just as here, the DHHS did not highlight the change on the form or provide additional materials "explaining and describing estate recovery and warning that some of [the decedent's] estate could be subject to estate recovery." *Id.* at 273. In *Keyes*, this Court held that the inclusion of the new paragraph in the form's acknowledgements section "sufficiently notified [the decedent] that her estate could be subject to estate recovery." *Id.* The statutes have not been amended since *Keyes* and still do not demand a separate notification or that the new provision be highlighted in any manner. Accordingly, we are bound to hold that the notice in these matters was statutorily sufficient and the probate courts erred in concluding otherwise. (55a-56a)

Gorney's reliance upon *Keyes'* statutory analysis, however, is misplaced.

A. MCL 400.112g(3)(e) and MCL 400.112g(7) Should Be Read Harmoniously to Require the DHHS to Provide Written Notice Describing the Provisions of the Estate Recovery Program and What Actions May Be Taken Against an Individual's Estate at the Time the Individual Enrolls in the Medicaid Program for Long-Term Care Services.

The starting point for the analysis begins with the observation that, pursuant to MCL 400.112g(1), "the department of community health [DHHS] shall establish and operate the Michigan medicaid estate recovery program to comply with the requirements contained in section 1917 of title XIX."[3] To this end, pursuant to MCL 400.112(g)(3), the DHHS was required to "apply for any necessary waivers and approvals from the federal centers for medicare and medicaid services to implement the Michigan medicaid estate recovery program." MCL 400.112(g)(3) further states that the DHHS "shall seek approval from the federal centers for medicare and medicaid regarding all of the following:"

> (a) Which medical services are subject to estate recovery under section 1917(b)(1)(B)(i) and (ii) of title XIX.
>
> (b) Which recipients of medical assistance are subject to estate recovery under section 1917(a) and (b) of title XIX.
>
> (c) Under what circumstances the program shall pursue recovery from the estates of spouses of recipients of medical assistance who are subject to estate recovery under section 1917(b)(2) of title XIX.
>
> (d) What actions may be taken to obtain funds from the estates of recipients subject to recovery under section 1917 of title XIX, including notice and hearing procedures that may be pursued to contest actions taken under the Michigan medicaid estate recovery program.

[3] See Swanberg & Steward, *Medicaid Estate Recovery Update: What You Need to Know Now*, 93 Mich B J 28, 28 (May 2014)("The term "estate recovery" refers to provisions of federal law requiring states to attempt to recover payments made to healthcare providers on behalf of a Medicaid recipient from the recipient's estate after his or her death.").

> (e) Under what circumstances the estates of medical assistance recipients will be exempt from the Michigan medicaid estate recovery program because of a hardship. At the time an individual enrolls in medicaid for long-term care services, the department of community health shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship. The department of community health shall develop a definition of hardship according to section 1917(b)(3) of title XIX that includes, but is not limited to, the following:
>
> > (i) An exemption for the portion of the value of the medical assistance recipient's homestead that is equal to or less than 50% of the average price of a home in the county in which the medicaid recipient's homestead is located as of the date of the medical assistance recipient's death.
> >
> > (ii) An exemption for the portion of an estate that is the primary income-producing asset of survivors, including, but not limited to, a family farm or business.
> >
> > (iii) A rebuttable presumption that no hardship exists if the hardship resulted from estate planning methods under which assets were diverted in order to avoid estate recovery.
>
> (f) The circumstances under which the department of community health may review requests for exemptions and provide exemptions from the Michigan medicaid estate recovery program for cases that do not meet the definition of hardship developed by the department of community health.
>
> (g) Implementing the provisions of section 1396p(b)(3) of title XIX to ensure that the heirs of persons subject to the Michigan medicaid estate recovery program will not be unreasonably harmed by the provisions of this program.

In pertinent part, to implement the Michigan Medicaid estate recovery program, the DHHS thus had to seek approval from the Centers for Medicare and Medicaid Services ("CMS") about (c) "[w]hat actions may be taken to obtain funds from the estates of recipients subject to recovery;" (e) "[u]nder what circumstances the estates of medical assistance recipients will be exempt from the Michigan medicaid estate recovery program because of a hardship;" and (g) "[i]mplementing the provisions of section 1396p(b)(3) of title xix to ensure that the heirs of persons subject to the Michigan medicaid estate recovery program will not be unreasonably harmed by the provisions of the program." Tellingly, "***[a]t the time an individual enrolls in***

medicaid long-term care services," MCL 400.112g(3)(e) states that the DHHS "***shall*** provide to the individual written materials explaining the process for applying for a waiver from estate recovery." The Merriam-Webster's Dictionary defines the phrase "at the time" to mean "concurrent with." The word "shall" is generally used to designate a mandatory provision. *Roberts v Mecosta County General Hospital*, 466 Mich 57, 65 (2002). Accordingly, in compliance with 42 USC § 1396p(b), MCL 400.112g(3)(e) requires that the DHHS provide an individual with the written materials explaining the process for applying for a waiver from estate recovery at the time that individual enrolls in Medicaid program for long-term care services.

Given the mandate under MCL 400.112g(e)(3), it is apparent that "[a]t the time an individual enrolls in medicaid long-term care services," the DHHS "shall provide" not only "the individual written materials explaining the process for applying for a waiver from estate recovery," but also written materials about the provisions of the estate recovery program itself and what actions may be taken against the estate since seeking a waiver from the estate recovery program necessarily presupposes that the individual has already received these materials in making the decision whether to seek or apply for Medicaid eligibility for long-term care services and then enroll in the program.[4] Simply stated, applying for a waiver from the estate recovery program implies that the individual seeking Medicaid eligibility or admission into the Medicaid

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[4] The Meriam-Webster's Dictionary defines "enroll" as "to enter (someone) as a member of or participant in something;" "to take (someone) as a member or participant;" "to become a member or participant." The Random House Webster's College Dictionary similarly defines "enroll" in pertinent part as "to make officially a member of a group." In *Keyes*, the Court of Appeals appeared to hold that "enrollment" was when Olive Rasmer first applied for Medicaid long-term care benefits, but that the subsequent redetermination was actually "seeking medicaid eligibility" and that this was not "enrollment." This construal is contrary to our common understanding that "enrollment" occurs after an individual's original application seeking eligibility for Medicaid long-term care benefits is approved. Thus, subsequent determinations of continued eligibility are just that – a determination of continued eligibility to make sure that the enrolled individual is still eligible for Medicaid long-term care services.

program for long-term care services program would also have received written materials about the provisions of the estate recovery program and what actions may be taken against the individual's estate at the time the individual applies for enrollment in the Medicaid program. Thus, it stands to reason that, in seeking approval from the CMS for the implementation of the estate recovery program in compliance with 42 USC § 1396p(b), the DHHS was also required to provide written information describing the provisions of the estate recovery program and what actions may be taken against the individual's estate at the time the individual applies for enrollment in the Medicaid program for long-term care services.

Considering that MCL 400.112g(3)(e) should be construed to require the DHHS to provide an individual with written materials about the provisions of the estate recovery program and what actions may be taken against the individual's estate at the time that individual applies for enrollment in the Medicaid program for long-term care services, MCL 400.112g(7) should be construed in similar fashion as to require the DHHS to "provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the Michigan Medicaid estate recovery program" at the time an individual initially applies for enrollment in the Medicaid program for long-term care services. Notwithstanding *Keyes*, MCL 400.112g(3)(e) and MCL 400.112g(7) must be read in the context of the entire statute so as to produce a harmonious whole. *Macomb County Prosecuting Attorney v Murphy*, 464 Mich 149, 159 (2001).[5] As a practical matter, an individual has to seek or apply for Medicaid eligibility for

[5] Words of a statute are to be given "their plain and ordinary meaning," which requires consideration of the placement of words in the statutory scheme. *Herman v Co of Berrien,* 481 Mich 352, 366 (2008). What is under analysis here is essentially one statute – MCL 400.112g – which has multiple subsections and provisions. The focus of the statutory analysis is the language that the Legislature placed in one statutory subsection – MCL 400.112g(3)(e), but which was omitted in another subsection of the same statute – MCL 400.112g(7). However, when discerning legislative intent, a particular word in one statutory section must be interpreted

the long-term care services in order to enroll in the Medicaid program. Because seeking Medicaid eligibility for long-term care services occurs before enrolling in the program, it necessarily follows that the DHHS must "provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the Michigan Medicaid estate recovery program" at the time the individual is enrolled. [6] Thus, this Court should interpret MCL 400.112g(3)(e) and (7) harmoniously to require that the DHHS provide written notice describing the provisions of the estate recovery program and what actions may be taken against the individual's estate at the time the individual applies for enrollment in the Medicaid program for long-term care services, "including, but not limited to, a statement that some or all of their estate may be recovered."

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in conjunction with every other section, "so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v Crocker*, 219 Mich 178, 183 (1922).

[6] See also *In re Estate of Kathryn M. Salemka-Shire, supra*, where Judge Sullivan reaches a similar conclusion but based upon a slightly different statutory analysis:

> The *unambiguous language* of the statute requires [the DHHS] to provide written materials to an individual at the time of enrollment for Medicaid benefits. These materials must describe the provisions of Michigan's SPA and must explain that recovery efforts under the SPA may invade some or all of that individual's estate. MCL 400.112g(7). Given the common and ordinary meaning of these words, and given the context of MCL 400.112g(3)(g), which requires implementation of an SPA without unreasonable harm to a recipient's heirs, the intent of the statute is to provide distinct written materials about Michigan's SPA to enrollees, in this case Shire, at the time of enrollment. Plaintiff failed to comply with mandatory notice requirement. [80a (Emphasis added)]

Here, the probate court's assertion that the language of the statute is "unambiguous" plainly ignores the fact that "reasonable minds could [and did in *Keyes*] differ with respect to its meaning." *Peterson, supra*, 484 Mich at 328.

B. Section §3810G(1) of the CMS' *State Medicaid Manual* Requires the DHHS to Provide Written Notice Describing the Provisions of the Michigan Estate Recovery Program and What Actions May Be Taken Against an Individual's Estate at the Time the Individual Applies for Enrollment in the Medicaid Program for Long-Term Care Services.

As already observed, in *Schweiker v Gray Panthers, supra*, 453 US at 36-37, the United States Supreme Court declared:

> Each participating State develops a plan containing "reasonable standards . . . for determining eligibility for and the extent of medical assistance." 42 USC § 1396a (a)(17). An individual is entitled to Medicaid if he fulfills the criteria established by the State in which he lives. ***State Medicaid plans must comply with requirements imposed both by the Act itself and by the Secretary of Health and Human Services (Secretary).*** See § 1396a (1976 ed. and Supp. III) (Emphasis added.).

See also *Wis Dep't of Health & Family Servs v Blumer*, 534 US at 479 ("'Each participating State develops a plan containing reasonable standards . . . for determining eligibility for and the extent of medical assistance within the boundaries set by the Medicaid statute[s] and the Secretary of Health and Human Services [HHS].'" Accordingly, the Michigan estate recovery program set forth in MCL 400.112g-k must comport with the procedural requirements imposed by federal law.

In implementing the 1993 OBRA amendments creating the estate recovery program, the HHS promulgated the federal standards for the States' Medicaid recovery programs in the CMS' *State Medicaid Manual*.[SMM]. Specifically, the CMS added §3810G to the *State Medicaid Manual*, which sets forth the operating policies and procedures to be followed by the States in implementing the estate recovery program in compliance with 42 USC §1396p. Section 3810G requires that states provide both a general notice of the provisions of the estate recovery program at the time of the Medicaid application for long-term care services and also a notice of specific recovery. Specifically, §3810G(1) provides:

> Notice.—

1. General Notice. -- ***You [the State] should provide notice to individuals at the time of application for Medicaid that explains the estate recovery program in your State.*** [83a (Emphasis added)].[7]

Thus, pursuant to §3810G(1), written notice should be provided to individuals at the time of the Medicaid application with an explanation of the provisions of the estate recovery program. [8]

Requiring notice at the time of the Medicaid application was reinforced by the U.S. Department of Health and Human Services and Thompson/Medset in *Medicaid Estate Recovery* (April 2005):

> Procedural rules are intended to ensure that individuals are informed about Medicaid program requirements ***before*** they complete the application process. States are advised to tell applicants about the potential for Medicaid estate recovery during the eligibility determination process.

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[7] Section 3810G of the *State Medicaid Manual*, http://www.cms.gov/Regulations-and-Guidance/Guidance Manuals/Paper-Based-Manuals-Items/CMS021927.html.

[8] As noted by the ABA Commission on Law and Aging in *Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices* written by Naomi Karp, Charles P. Sabatino, and Erica F. Wood:

> A key obligation of states is to ensure adequate notice to beneficiaries and survivors. Notices ideally convey clear information about the scope of the program, how it affects individual estates, and procedures for review. A significant federal case, *DeMille v Belshe*, [1994 U.S. Dist. LEXIS 13917 (ND Cal 1994)] emphasizes the importance of due process right to receive notice. It holds that if a state files a post-death lien against property in the hands of the surviving spouse, the state must give the survivor preattachment notice and an opportunity to be heard. *In §3810 of the State Medicaid Manual, CMS requires that states provide both a general notice of estate recovery* ***at the time of application*** *and a notice of specific recovery.* [107a (Emphasis added; footnotes omitted)].

In a follow-up report written by Erica F. Wood and Ellen M. Klem, *Protections in Medicaid Estate Recovery: Findings, Promising Practices and Model Notices* (May 2007), the ABA Commission on Law and Aging reiterated:

> [P]rovid[ing] general notice of estate recovery when individuals apply for assistance . . . is a cornerstone of fairness. Applicants need to be aware that by enrolling in the program, they are agreeing to give back at a later point the value of the care received, that is, the care comes with the caveat that the estate eventually will pay the state back. [119a].

> There are wide variations in the ways in which states implement estate recovery, depending upon their Medicaid program and state laws. However, Federal law requires all states to incorporate the following protections for Medicaid recipients into the design of their estate recovery program:
>
> **Recipient protections in Medicaid estate recovery:**[FN 25]
>
> - The State should notify Medicaid recipients about the estate recovery program during their initial application for Medicaid eligibility and annual re-determination process. [88a (Emphasis added)].

As set forth in Footnote 25, section 3810G of the CMS' *State Medicaid Manual* provides that "the State should notify Medicaid recipients about the estate recovery program during their ***initial application*** for Medicaid eligibility and annual re-determination process." [88a (Emphasis added)].[9]

While the CMS' *State Medicaid Manual* is not binding law as such, it does set forth the CMS' guidelines for each State's implementation of the estate recovery program. Accordingly, the agency's interpretation in the *State Medicaid Manual* § 3810G should be given "respect according to its persuasiveness,'" as evidenced by "the thoroughness evident in the agency's consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *United States v Mead Corp*, 533 US 218,

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[9] In *Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices*, the ABA Commission on Law and Aging also observed:

> Upon Application. As shown in table 19, 43 states give such notice in writing at the time of Medicaid application; 2 states (Arkansas and Hawaii) did not report giving a notice at application; and 1 state (Virginia) was DK/NR. In some states, this notice is a one-line or brief paragraph reference to estate recovery in the application form. It may be included in a list of many beneficiary "rights and responsibilities;" frequently the enrollee must sign to indicate that he or she has reviewed the list.
>
> At least 14 states have booklets or brochures on estate recovery that are given to all Medicaid applicants, or at least to those age 55 years and older or in institutional care. . . . At least six states also give notice at the time of redetermination of eligibility. Ten states give notice at the time of approval of the Medicaid application. [107a-108a].

228 (2001), citing *Skidmore v Swift & Co*, 323 US, 134 (1994) and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*, 467 US 837 (1984), *inter alia*. Although the United States Supreme Court recognized in *Mead Corp* that the application of *Skidmore* deference can thus produce "a spectrum of judicial responses, from great respect at one end to near indifference at the other," the Court has indicated that HHS interpretations should receive more respect and "broad deference." *Thomas Jefferson Univ v Shalala*, 512 US 504, 512 (1994); *Schweiker v Gray Panthers, supra*, 453 US at 43 & n14. Accordingly, the CMS' interpretation of § 3810G(1) of the *State Medicaid Manual* warrants respectful consideration and significant deference in light of the complexity of the Medicaid statute and the considerable expertise of the administering agency.

Consequently, as a matter of federal law pursuant to 42 USC § 1396p and § 3810G(1) of the CMS' *State Medicaid Manual*, MCL 400.112g(3)(e) and (7) must be read harmoniously to require proper written notice describing the provisions of the Michigan estate recovery program and what actions may be taken against an individual's estate at the time the individual applies for enrollment in the Medicaid program for long-term care services. Here, *Keyes*' interpretation of the state statutory notice provisions implementing the estate recovery program plainly ignores the United States Supreme Court's injunction that "State Medicaid plans ***must comply*** with requirements imposed both by the Act itself and by the Secretary of Health and Human Services." (Emphasis added.). Therefore, MCL 400.112g(3)(e) and (7) must be read in conformity with 42 USC § 1396p and § 3810G(1) of the *State Medicaid Manual* to require proper written notice describing the provisions of the Michigan estate recovery program and what actions may be taken against an individual's estate at the time the individual initially applies for enrollment in the Medicaid program for long-term care services.

C. The Doctrine of Constitutional Avoidance Directs this Court to Adopt the Interpretation of MCL 400.112g Requiring the DHHS to Provide Written Notice Describing the Provisions of the Michigan Estate Recovery Program and What Actions May Be Taken Against an Individual's Estate at the Time the Individual Applies for Enrollment in the Medicaid Program for Long-Term Care Services.

Finally, assuming that this Court determines that the statute in question is ambiguous and that the *Keyes'* interpretation is a reasonable construction, MCL 400.112g(3)(e) and (7) should nonetheless be interpreted harmoniously to require the DHHS to provide written notice at the time the individual applies for enrollment in the Medicaid program under the doctrine of constitutional avoidance. This doctrine is a well-established canon of statutory construction that, if fairly possible, a court will adopt the interpretation that avoids the unconstitutional construction. See *Morse v Republican Party of Virginia*, 517 US 186 (1996)(discussing the doctrine that allows the Court to interpret ambiguous federal statutes to have a meaning that avoids constitutional questions); *Concrete Pipe and Products of California, Inc v Construction Laborers Pension Trust for Southern California*, 508 US 602, 628-29 (1993)(noting that in the case of statutory ambiguity, the Court should apply the constitutional avoidance doctrine by adopting the statutory construction that avoids the constitutional question). In accord with the doctrine of constitutional avoidance, a court may be guided by the presumption that the Legislature does not intend a result that is violative of constitutional provisions. *Cf. Gilbert v Second Injury Fund*, 463 Mich 866, 867 (2000); *People v McIntire*, 461 Mich 147, 155-156 and n 8 (1999) (noting that statutory interpretation that leads to an absurd result should be avoided only when the statute is ambiguous).

As discussed in the next issue, the *Keyes*' interpretation of MCL 400.112g(3)(e) and (7), if adopted, would violate the constitutional principles of procedural due process, namely, timely and reasonably sufficient notice of the estate recovery program at the time the individual applies

for enrollment in the Medicaid program. Because there is an alternative construction of these statutory provisions that avoids the constitutional problem, this Court should apply the constitutional avoidance doctrine and adopt the interpretation of MCL 400.112g(3)(e) and (7) that requires the DHHS to provide written notice describing the provisions of the estate recovery program and what actions may be taken against the individual's estate at the time the individual applies for enrollment in the Medicaid program for long-term care services, "including, but not limited to, a statement that some or all of their estate may be recovered."

D. Pursuant to MCL 400.112g in Compliance with 42 USC § 1396p(b) and § 3810G(1) of the CMS' *State Medicaid Manual* and the Doctrine of Constitutional Avoidance, the DHHS Should Not Be Permitted to Seek Recovery from the Estate of Olive Rasmer.

Based upon the foregoing analysis, the DHHS should not be permitted to seek recovery from the Estate of Olive Rasmer because the DHHS did not provide her with written notice describing the provisions of the Michigan Medicaid estate recovery program and what actions may be taken against her estate at the time that she applied for enrollment in the Medicaid program for long-term care services in 2009.[10] As a matter of fact, at the time that Olive Rasmer applied for enrollment in Medicaid in 2009, the Michigan Medicaid estate recovery program had not yet obtained approval from the federal government and thus had not been implemented.[11] Because no estate recovery program was in effect at the time Olive Rasmer applied for enrollment in Medicaid, the DHHS' predecessor, the Department of Community Health, could not have complied with MCL 400.112g by providing the statutorily-required written information

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[10] As discussed in the next issue, the notice provided by the DHHS in the acknowledgment form is also clearly inadequate to satisfy the Due Process requirements of "timely and "reasonably sufficient notice."

[11] As noted in the Estate of Olive Rasmer's brief to the Court of Appeals, "no such plan was approved, as noted, until years after Ms. Rasmer began receiving medicaid benefits, and notice of the potential for estate recovery to Ms. Rasmer was still yet to be given." (COA Br., p 7)

to her describing the provisions of the estate recovery program and what actions may be taken against her estate at the time that she applied for enrollment in Medicaid.[12]

Moreover, the notice that was provided to Olive Rasmer in 2013 did not sufficiently describe the provisions of the estate recovery program or state what specific actions may be taken against her estate after her death. Specifically, the putative notice occurs in the acknowledgment section of the final paragraph of a long multipage redetermination application:

> I understand that upon my death the Michigan Department of Community Health [now the DHHS] has the legal right to seek recovery from my estate for services paid by Medicaid. MDCH will not make a claim against the estate while there is a legal surviving spouse or a legal surviving child who is under the age of 21, blind, or disabled living in the home. An estate consists of real and personal property. Estate Recovery only applies to certain Medicaid recipients who received Medicaid services after the implementation date of the program. MDCH may agree not to pursue recovery if an undue hardship exists. For further information regarding Estate Recovery, call 1-877-791-0435.

Simply put, such a vague, unspecific statement did not provide Olive Rasmer with written information sufficiently describing the provisions of the estate recovery program and the particular actions that may be taken against her estate upon her death. In particular, the statement in the acknowledgment section lacks any specificity as to the nature and scope of the estate recovery program and was clearly insufficient to make her aware of the potential financial consequences of estate recovery to her estate after her death.

Accordingly, because the DHHS did not provide Olive Rasmer with written notice describing the provisions of the Michigan Medicaid estate recovery program and what actions may be taken against her estate at the time that she applied for enrollment in the Medicaid program for long-term care services in 2009, the DHHS should not be permitted to seek recovery

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[12] See *In the Matter of Estate of Alberta Ketelhut, a/k/a Alberta Ida Ketelhut*, Deceased, No. 2013-0872CZ-N (Berrien Ct. Probate Court 2014) where Judge Thomas E. Nelson in an opinion and order granted the Estate's motion for summary disposition under MCR 2.116(C)(8), holding that the DHHS could not seek estate recovery since "Ms. Ketelhut began receiving Medicaid benefits for her LTC prior to the effectiveness of Michigan's SPA . . . ."). [121a-128a].

from her Estate in this matter. Thus, this Court should reverse the Court of Appeals' decision in *Gorney* and reinstate the probate court's decision denying the DHHS' claim seeking estate recovery in the amount of $178,133.02 because the probate court did not err in granting the Estate of Olive Rasmer's motion for summary disposition under MCR 2.116(C)(10).

II. THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE 1, § 17 OF THE 1963 MICHIGAN CONSTITUTION REQUIRE TIMELY AND REASONABLY SUFFICIENT NOTICE OF THE PROVISIONS OF THE MEDICAID ESTATE RECOVERY PROGRAM AND WHAT ACTIONS MAY BE TAKEN AGAINST THE ESTATE AT THE TIME THE INDIVIDUAL APPLIES FOR ENROLLMENT IN THE MEDICAID PROGRAM FOR LONG-TERM CARE SERVICES.

Although Michigan's state statutory provisions implementing the estate recovery program should be interpreted harmoniously to require written notice describing the provisions of the estate recovery program and what actions may be taken against an individual's estate at the time the individual applies for enrollment in Medicaid, this is not the end of the inquiry. For Due Process under the state and federal constitutions also requires timely and reasonably sufficient written notice of the provisions of the estate recovery program and what actions may be taken against an individual's estate at the time the individual applies for enrollment in the Medicaid program for long-term care services.

The Due Process Clauses of 1963 Const, art 1, § 17 and US Const, am XIV provide that the state shall not deprive a person of life, liberty, or property without due process of law. *In re Estate of Keyes*, 310 Mich App at 274, citing *Elba Twp, supra*, 493 Mich at 288. Under the Due Process Clause of the Fourteenth Amendment, individuals, whose property interests are at stake, must be afforded notice and an opportunity to be heard. *Dusenberry v United States*, 534 US 161 (2002); *In re Estate of Keyes, supra*, citing *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606 (2004). In particular, the Due Process Clause of the Fourteenth

Amendment requires that the State provide applicants for Medicaid with due process protections. See *Goldberg v Kelly*, 397 US 254 (1970); *DeMille v Belshe*, 1994 U.S. Dist. LEXIS 13917 (ND Cal 1994); William J. Browning, *Demanding Due Process from State Medicaid Agencies*, 1007, NAELA Journal, Vol III, No. II (2007).

A. Due Process Requires Timely and Reasonably Sufficient Notice.

As the analytical point of departure, it is important to keep in mind that an essential part of the due process guarantee of an opportunity to be heard is the corollary promise of prior notice. See *Mathews v Eldridge*, 424 US 319, 325 n 4 (1976) (summarizing the due process factors set forth in *Goldberg*); 4 Wright & Miller, *Federal Practice and Procedure*, § 1074 at 456 (2d ed. 1987) (stating that the "requirement of reasonable notice must be regarded as part of due process"). Rudimentary due process protection includes timely and reasonably sufficient notice and an opportunity to be heard. *Goldberg, supra*, 397 US at 267 (holding that "timely and adequate notice" is required). As explained in *Mullane v Central Hanover Bank & Trust Co*, 399 US 306, 314 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated*, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." . . . The notice must be of such nature as reasonably to convey the required information. (Citations omitted; emphasis added.).

The United States Supreme Court further held that "the means employed must be such as desirous of actually informing the [person] might reasonably adopt to accomplish it." *Id.*

As this Court noted in *Dow v State*, 396 Mich 192, 202 (1976), "[t]he Due Process Clause is a limitation on state action." Specifically, this Court stated:

> In analyzing due process claims, the United States Supreme Court first determines, "[w]hether any procedural protections are due" and then decides "what process is due." *Morrissey v Brewer*, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972).

> In determining whether any procedural protection is required, the Court considers "whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey v Brewer, supra*, p 481 . . .
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> * * *
>
> Addressing the question what process is due, we note that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v Brewer, supra*, p 481.
>
> * * *
>
> . . . "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v Central Bank & Trust Co, supra*, p 314. [396 Mich at 202-206].

Likewise, the United States Supreme Court has established a two-part test for due process challenges to state statutes that implicate property rights. See *Fuentes v Shevin*, 407 US 67 (1972); *Mathews, supra*, 424 US at 319. The first prong of the analysis is whether the statute results in a deprivation of a "significant" property interest. *Fuentes, supra*, 407 US at 86. If so, the second prong directs the court to examine what process is due under the particular circumstances.

In this case, the Michigan Medicaid estate recovery program allowing the DHHS to engage in estate recovery for long-term care assistance afforded to an individual must also comply with the procedural due process protections provided by 1963 Const, art 1, § 17 and US Const, am XIV. As in *Dow*, the Due Process Clause applies to this case because Olive Rasmer's "property interests" when she was alive were "protected by procedural due process." *Id.* at 204 (stating that "the actual owner * * * of real estate, chattels or money" has "property interests protected by procedural due process"), citing *Bd of Regents v Roth*, 408 US 564 (1972). [13]

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[13] In implementing Medicaid estate recovery, Michigan uses its own definition of "estate" set forth in MCL 400.112h, which provides:

> For the purposes of sections 112g to 112j:

Because "due process is flexible and calls for such procedural protections as the particular situation demands," it is essential for the purpose of rational life and estate planning at the end of an individual's life that ***timely and reasonably sufficient written notice*** be provided of the provisions of the estate recovery program and the actions that may be taken against the individual's estate at the time of enrollment in the Medicaid program. Such notice is necessary in order to allow individuals to consider their planning options on an informed basis so as to arrange their end-of-life affairs, preserving the bounty of their lives and protecting their right to dispose of their property. Indeed, it is a basic principle of the law of wills that an individual possesses the legal right to dispose of his or her property upon death in accordance with the individual's desires. As this Court explained in *Abraham v Doster,* 310 Mich 433, 444 (1945), "the primary concern is giving of effect to the legal acts of deceased' as set forth in the will because the "[d]eceased had a right to dispose of his property as he saw fit." This right is a property right; the deprivation of such a fundamental constitutional right cannot occur without due process of law.

(a) "Estate" means all property and other assets included within an individual's estate that is subject to probate administration under article III of the estates and protected individuals code, 1998 PA 386, MCL 700.3101 to 700.3988, except assets otherwise subject to claims under section 3805(3) of the estates and protected individuals code, 1998 PA 386, MCL 700.3805, are not part of the estate.

(b) "Property" means that term as defined in section 1106 of the estates and protected individuals code, 1998 PA 386, MCL 700.1106.

MCL 700.1106(u) defines "property" as "anything that may be subject of ownership, and includes both real and personal property or an interest in real or personal property." As defined, only property and assets that passes through probate is subject to estate recovery. Thus, even though States may expand the definition of estate to include other real or personal property and other assets to which the Medicaid beneficiary has legal title or interest at the time of death, the Michigan Legislature explicitly excluded property and assets from Medicaid estate recovery which are outside the probate estate and which do not pass by will or by the laws of intestacy.

Further, given the potentially far-reaching financial consequences of the estate recovery program affecting significant property interests within the protection of the Due Process Clause, it is critical that timely and reasonably sufficient written notice of the provisions of the estate recovery provisions and what actions may be taken against an individual's estate after his or her death be provided at the time the individual applies for enrollment in the Medicaid program for long-term care services in order to allow him or her to make a rationally informed decision about whether to enter the Medicaid program in the first place, or arrange one's affairs differently, pursuing alternative courses of action. Simply put, without proper written notice, there is no meaningful opportunity for an individual knowingly and voluntarily placing his or her estate at risk of estate recovery by the DHHS as a result of agreeing to enroll in the Medicaid program for long-term care services. In short, what is required by the Due Process Clauses under the state and federal constitutions is that the DHHS provide an individual with written materials clearly describing the provisions of the Michigan Medicaid estate recovery program and what actions may be taken against the estate at the time the individual applies for enrollment in the Medicaid program for long-term services.

B. The DHHS Violated Due Process by Failing to Provide Timely and Reasonably Sufficient Written Notice Describing the Provisions of the Estate Recovery Program and What Actions May Be Taken Against Her Estate at the Time that Olive Rasmer Applied for Enrollment in the Medicaid Program for Long-Term Care Services Contravened Due Process.

In this case, the DHHS, in violated of due process, failed to provide Olive Rasmer with timely ***and*** reasonably sufficient written notice describing the provisions of the estate recovery program and what actions may be taken against her estate at the time she applied for enrollment in the Medicaid program for long-term care services. First, the DHHS failed to provide timely notice of the estate recovery at the time Olive Rasmer applied for enrollment in Medicaid in

2009. Simply stated, providing written notice at the time of her application for redetermination of Medicaid benefits was far too late for due process purposes. As explained in the Estate of Olive Rasmer's appeal brief to the Court of Appeals:

> Lack of notice certainly had a detrimental effect upon what actions Ms. Rasmer or those acting on her behalf could have taken. The Department disparagingly refers to loopholes that are available to applicants. The fact of the matter remains that estate recovery applies only to assets of a recipient which need to be protected. MCL 700.3805(1)(f). MCL 400.112h defines "estate" as meaning all property and other assets included within an individual's estate that is subject to probate administration under EPIC [Estates and Protected Individuals Code].
>
> Not having afforded the decedent or her representative's timely notice that her estate might be subject to estate recovery, Ms. Rasmer was denied the opportunity to engage in lawful planning to avoid probate administration. Such easy, lawful, and commonly accepted principles of estate planning could have involved creation of a trust, use of "ladybird" deeds, or even the possibility of limited divestment planning, which though it would have incurred a penalty period, would have afforded the estate the lawful opportunity to preserve some of the value of the estate. [COA Br., pp 7-8][14]

Here, *Gorney's* reliance upon *Keyes* for the proposition that notice of the estate recovery program was not required by the Due Process Clause at the time of an individual's enrollment, but was sufficient at the time of the eligibility redetermination, violated procedural due process under the Fourteenth Amendment to the United States Constitution and Article 1, § 17 of the 1963 Michigan Constitution. *Mullane, supra* at 314. [15]

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[14] A "Lady Bird" deed offers a simple way to transfer real estate at one's death without probate and is commonly used in Michigan for estate planning purposes to pass property upon death. Named after President Lyndon Baines Johnson's wife, it establishes a type of ownership in which the original owner retains a life estate in the property with an unlimited power of appointment. The principal benefit is that the property in a "ladybird" deed form of ownership avoids probate, and thus provides a way to avoid Medicaid estate recovery.

[15] As already discussed, it is apparent that the critical language – "at the time an individual enrolls in Medicaid for long-term services" – was inadvertently omitted (by accident, mistake or simple carelessness) by the Legislature in drafting MCL 400.112g(7), even though it was used in MCL 400.112g3(e). As a result, the statutory notice provision, as interpreted by the Court of Appeals in *Keyes* and followed in *Gorney*, has created the due process violation that this Court is now asked to remedy.

The DHHS also failed to provide reasonably sufficient notice about the estate recovery program that would have made Olive Rasmer aware of the potential financial consequences to her estate after death. As already observed, the DHHS provides the putative notice in the acknowledgment section of the final paragraph of a long multipage redetermination application:

> I understand that upon my death the Michigan Department of Community Health [now the DHHS] has the legal right to seek recovery from my estate for services paid by Medicaid. MDCH will not make a claim against the estate while there is a legal surviving spouse or a legal surviving child who is under the age of 21, blind, or disabled living in the home. An estate consists of real and personal property. Estate Recovery only applies to certain Medicaid recipients who received Medicaid services after the implementation date of the program. MDCH may agree not to pursue recovery if an undue hardship exists. For further information regarding Estate Recovery, call 1-877-791-0435.

It is plainly evident, however, that this general and vague statement in the final paragraph of a long multipage redetermination application does not put an individual on reasonably sufficient notice that the DHHS "has the legal right to seek recovery from my estate for services paid by Medicaid" because it completely fails to provide the individual with written materials clearly and specifically describing the provisions of the Michigan Medicaid estate recovery program and what actual recovery may be sought against one's estate. As the Sixth Circuit explained in *Garrett v Puett*, 707 F2d 930, 931 (CA6 1983), adequate notice for reduction or termination of Medicaid benefits includes the following: (1) ***a detailed statement of the intended action;*** (2) reason for the change in status; (3) citation to the specific statutory section requiring reduction or termination; and (4) specific notice)(Emphasis added.); see also 42 CFR § 431.210 (2006)(requiring adequate notice involving a ***statement of what action the agency intends to take*** when reducing or terminating a recipient's Medicaid benefits)(Emphasis added.). Here again, *Gorney* wrongly relied upon *Keyes* for the proposition that DHHS' notice of the estate recovery program in the final paragraph of a long multipage redetermination application was sufficient under the Due Process Clauses of the Fourteenth Amendment to the United States

Constitution and Article 1, § 17 of the 1963 Michigan Constitution because it does not provide reasonably sufficient notice of the provisions of the estate recovery program as to alert an individual about what actions the DHHS may take against an individual's estate after death.

Accordingly, Michigan's Medicaid statutory notice procedure, as interpreted by the Court of Appeals in *Keyes* and *Gorney*, deprived Olive Rasmer of significant property interests, as defined under MCL 400.112h, which are protected by the Due Process Clauses under the state and federal constitutions. Contrary to the Court of Appeals' analysis in *Keyes*, it is necessary to recognize that the due process violation at issue stems from what is required by the 1963 Const, art 1, § 17 and US Const, am XIV, independent of what is also required by MCL 400.112g in conformity with 42 USC § 1396p and § 3810G(1) of the CMS' *State Medicaid Manual*. According to the Court of Appeals' interpretation in *Keyes* and followed in *Gorney*, however, MCL 400.112g does not require timely and reasonably sufficient notice of the estate recovery program at the time the individual applies for enrollment in Medicaid. But that is precisely the problem, for it is the timeliness and adequacy of Michigan's notice provision in MCL 400.112g(3)(e) and (7), as interpreted by the Court of Appeals, that is being called into question as violative of due process because it was not "reasonably calculated" to apprise a Medicaid applicant of the financial consequences of the estate recovery program for long-term care assistance at the time of his or her enrollment in Medicaid. *Mullane, supra*.

Thus, by not performing the requisite due process analysis, *Keyes* begged the question when it reasoned that there was no due process violation based upon its fallacious conclusion that "MCL 400.112g does not require notice at the time of enrollment." Simply stated, the Court of Appeals' interpretation of MCL 400.112(g) in *Keyes* does not satisfy the requirements of due process under 1963 Const, art 1, § 17 and US Const, am XIV because it does not provide timely

and reasonably sufficient notice to the individual about the actual provisions of the estate recovery program and what actions may be taken against that individual's estate upon his or her death at the time of enrollment in the Medicaid program for long-term care services. Consequently, the DHHS violated Olive Rasmer's right to due process.

C. Due Process Requires the Estate Recovery Program to Provide Written Notice Disclosing its Provisions and the Actions that May Be Taken Against an Individual's Estate After His or Her Death in Terms that Are Understandable and Meaningful to that Individual at the Time of the Application for Medicaid.

When Medicaid was established in 1965 as a federal-state partnership, it was designed to be a social welfare or social protection program that provided means-tested health and medical services for individuals with low incomes or modest resources. From its inception, Medicaid has essentially functioned as a publically-funded social insurance program that provides protection against economic insecurities based upon need. Since 1965, Medicaid has become the nation's long-term care safety net, particularly for catastrophic, unpredictable medical and health risks, such as Alzheimer's disease, spreading the costs of such unfortunate medical and health conditions under the aegis of cooperative Federalism.[16] Nevertheless, families still bear enormous responsibility for long-term care-giving at substantial cost.

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[16] More than one decade ago, the ABA Commission on Law and Aging noted:

> Close to 53 million Americans – about one in every nine – rely on the joint federal-state Medicaid program for their health care and long-term care. Medicaid is the nation's largest public health insurance program and pays for nearly half of all nursing home care in the country. Today, state Medicaid programs are caught in the grip of intense economic pressures set against a growing need for coverage for low-income people, including elders and those with disabilities. Increasingly, states are retooling their Medicaid programs, seeking cost-control strategies and, in some cases, cutting the rolls or reducing benefits. At the same time, debates are under way at the federal level about tightening the federal Medicaid contribution and loosening restrictions on how states operate their programs. Against this backdrop, estate recovery is seen as one approach for fiscal relief, bolstering distressed state Medicaid budgets. [99a].

Prior to 1993, States were permitted, but not required to establish Medicaid estate recovery programs. In 1993, Congress as part of OBRA enacted the mandatory estate recovery provisions. Since then, all the states have implemented mandatory estate recovery programs, effectively transforming the Medicaid program for long-term care services into a de facto lending arrangement in which the Medicaid beneficiary agrees to allow the State to recover the costs of medical and health care from his or her estate upon death.[17] As such, it establishes a creditor-debtor relationship amongst the DHHS and individual Medicaid beneficiaries who invariably have low incomes or modest resources. [18] Indeed, what is particularly alarming is that

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[17] In its 2007 report, the ABA Commission on Law and Aging pointed out that Medicaid beneficiaries and family members were caught off guard by this development:

> Although no one should be taken by surprise by Medicaid estate recovery, all too often, that is exactly what happens.
>
> Federal law requires states to recoup the amount of money that Medicaid spent on senior and institutional care if it is available from the estates of these Medicaid beneficiaries. By law, states can collect funds from estates after institutionalized or older Medicaid beneficiaries die by recovering against their homes and bank accounts to repay the government for services received.
>
> *Estate recovery makes the Medicaid program very different from the vast majority of federal programs, which do not require such repayment. This requirement for low-income Medicaid beneficiaries to pay the government back for services received is what often stuns surviving spouses and family members of deceased Medicaid recipients.*
>
> ***Meaningful notice and other protections are vital. Safeguards such as reasonable hardship waivers and adequate and timely notices help to ensure that Medicaid enrollees, surviving spouses, and other dependents, as well as potential heirs, are informed and treated fairly.*** [112a (Emphasis added)].

For that reason, "[a]pplicants need to be aware that by enrolling in the program, they are agreeing to give back at a later point the value of the care received, that is, the care comes with the caveat that the estate eventually will pay the state back." [119a].

[18] The debtor-creditor relationship is reflected in the language of the DHHS' Summons and Complaint at ¶ 1 ("The State of Michigan is a ***creditor*** whose claim has now been disallowed by the Personal Representative of this estate . . .") and ¶ 10 ("The Estate is justly ***indebted*** to the

this changed relationship has led the DHHS to take increasingly aggressive, legally unconstrained estate recovery collection efforts that are even directed at the estates of the Medicaid beneficiaries seeking the "hardship" exemption for a "homestead that is equal to or less than 50% of the average price of a home in the county in which the Medicaid recipient's homestead is located as of the date of the medical recipient's death" under MCL 400.112g(3)(e)(i). See Application for Leave to Appeal in *Michigan Dep't of Community Health v Sharon Plumford, Personal Representative of the Estate of Catherine Klein*, S. Ct No. 154355 (2016) (seeking this Court's review of whether the DHHS may adopt administrative rules and regulations that constrict the availability of the exemption stated in MCL 400.112g(3)(e)(1)).[19]

Consequently, given its present structure, the Medicaid estate recovery program appears analogous to a reverse mortgage (also known as the home equity conversion mortgage (HECM)) – a somewhat complicated financial instrument offered to those 62 years of age or over who have accumulated home equity and want to use this to supplement their retirement income.[20] The money received from a reverse mortgage is considered a loan advance. Although the HECM program does not have overly restrictive requirements, unlike other financial products such as a mortgage refinance, home equity loan, or home equity line of credit, it is noteworthy that an applicant for a reverse mortgage must meet with a HUD approved counselor before obtaining a

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State of Michigan in the amount of $178,138.02 for the Medicaid payment made on her behalf for long-term care services.") [3a-4a (Emphasis added)].

[19] Specifically, MCL 400.112(g)(3)(e) provides in pertinent part that the DHHS "must seek approval from the [CMS] regarding .* * * "[u]nder what circumstances the estates of medical assistance recipients will be exempt from the Michigan Medicaid estate recovery program because of a hardship." Even though the statute requires ***the estate*** to make the decision to seek the hardship exemption for half the average value of a home in the county where the Medicaid long-term care recipient died, the DHHS essentially wrote that exemption out of the law by requiring the ***beneficiaries*** to claim the exemption, not the estate, and further by requiring them to show that they are impoverished. In *In re Klein Estate* (COA 329715), the Court of Appeals erroneously approved that regime.

[20] For information about reverse mortgages, https://en.m.wikipedia.org/wiki/Reverse_mortgage.

reverse mortgage to determine if the product is suitable for his or her needs.[21] Specifically, the counseling sessions are designed so that individuals understand how the loan works and different alternatives that are available to them. In fact, beginning in 2014, all prospective borrowers must undergo a financial assessment to make sure that they can afford to pay future property taxes and homeowner's insurance. Generally, the loan does not have to be paid back until either the last surviving homeowner dies or moves out of the home.[22] Measured by the eligibility standards imposed upon the reverse mortgage program– a far less sweeping and onerous financial loan program, it is readily apparent that the Michigan estate recovery program falls considerably short of providing proper and meaningful written notice to Medicaid applicants at the time of the initial application for Medicaid so as to ensure that individuals actually understand how the estate recovery program works and the different alternatives that are available to them.

More than one decade ago, the ABA Commission on Law and Aging in *Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices* noted that wide variation existed in the notice that is provided to Medicaid beneficiaries about the estate recovery program:

> Meaningful notice is the backbone of procedural due process, and notice is a critical responsibility of states in implementing estate recovery. While states generally give some form of notice both up front at application for Medicaid and at the end as part of the judicial claim process, they vary greatly in the intervening points at which Medicaid enrollees or survivors are notified about recovery. Some give notice at nursing home admission, some at determination of permanent institutionalization, some at placement and enforcement of a lien, and some at a combination of these. . . .
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> * * *
>
> State estate recovery notices vary exceedingly in readability, print size, and the extent to which they are understandable. Medicaid enrollees and survivors may have only modest education, have poor vision, lack legal representation, or be under severe

[21] The HECM, which originates almost all reverse mortgages, is a program of the Federal Housing Administration (FHA), and these loans are guaranteed by the federal government.

[22] Typically, the estate typically sells that home and uses the proceeds from that sale to repay the reverse mortgage loan, with the heirs keeping any money left over. However, in the event that the sale of the house does not cover all the payments that the lender has made, then the lender must accept the financial loss and cannot go after the heirs for the balance.

> stress, any of which may affect their ability to read and respond to recovery notices. Many states include a brief notice about recovery in a lengthy laundry list of items in small print on the Medicaid application. This type of notice may not be effective in informing individuals of their rights. Attention is needed to develop creative ways to inform affected parties about estate recovery. . .
>
> Finally, notices vary in the extent to which they include vital information such as a contact for further information, exceptions to recovery, the right to request an itemized accounting, or the fact that the claim will not exceed the value of the estate. [109a-110a (Emphasis added)].

Notwithstanding the wide variation across the country in the type of notice provided to Medicaid beneficiaries about the estate recovery program, the Due Process requirement of "reasonably sufficient" notice requires that, at a minimum, the estate recovery program provide, like any other complicated financial lending program, disclosure statements of its provisions and what actions may be taken against an individual Medicaid beneficiary's estate in clear terms that are understandable and meaningful to that individual ***at the time the individual applies for enrollment in the Medicaid program for long-term care services.***[23] Specifically, as noted by ABA Commission on Law and Aging in its 2007 follow-up report, *Protections in Medicaid Estate Recovery: Findings, Promising Practices and Model Notices*:

> A key obligation of states is to ensure adequate notice to Medicaid applicants, recipients, and survivors. Notices ideally convey information clearly about the concept of recovery, the scope of the program, how it affects individual estates, and procedures for review.
>
> Meaningful notice is a fundamental responsibility of the States in implementing estate recovery. Moreover, such notice benefits Medicaid agencies, promoting all parties' understanding of the State's actions and procedures for challenging the action. Such notice also enhances efficiency and public trust. [119a].

As already observed, the "individual" in question is usually a person of advanced years, frail or in failing health, or someone with disabilities, who is "vulnerable to [making] decisions [under]

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[23] In *Protections in Medicaid Estate Recovery,* it was further observed that it is necessary to "*convey[] information* on estate recovery to Medicaid applicants and enrollees or their families – especially at the time of application, when understanding the program is critical." [117a (Emphasis in original)].

duress." (81a). For that reason, it is vital that the written notice of the estate recovery provisions and the actions that may be taken against an individual's estate be presented in clear language that is understandable and meaningful to this disadvantaged category of individuals at the time of the application for enrollment in the Medicaid program.[24]

III. THE RETROACTIVE APPLICATION OF THE ESTATE RECOVERY PROGRAM FOR SUCH PRE-NOTIFICATION SERVICES CONSTITUTES A VIOLATION OF AN INDIVIDUAL'S SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 1, § 17 OF THE 1963 MICHIGAN CONSTITUTION.

It is a foundational principle of American constitutional law that governmental action affecting an individual's property owned during his or her lifetime is subject to constitutional limitations under the Due Process and Takings Clauses of the state and federal constitutions. See *The Federalist No. 10* at 78 (J. Madison) (stating that the protection of property was "the first object of government"). Specifically, the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, § 17 of the Michigan Constitution

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[24] Whether required by Due Process or not, the DHHS, in drafting a proper written notice of the estate recovery program at the time of the Medicaid application, would be well-advised to incorporate some of the "promising practices" enumerated in *Protections in Medicaid Estate Recovery: Findings, Promising Practices and Model Notices.* (117a-120a). In particular, the ABA Commission on Law and Aging highlights the following:

- Make the estate recovery notice language more visible in the Medicaid application. . .
- Provide an estate recovery brochure to all new Medicaid applicants. A trained caseworker should explain the program and note in the database that the brochure was provided and recovery was discussed.
- Develop a system of regular consultation between the estate recovery unit and eligibility unit concerning training caseworkers, providing brochures, and responding to client questions.
- Inform enrollees about estate recovery not only at application but at other key points, such as redetermination of eligibility or admission to a certified facility. . . ." [120a].

provide that the state shall not deprive a person of life, liberty, or property without due process of law. *Elba Twp, supra,* 493 Mich at 288. "The essence of a claim of violation of substantive due process is that the government may not deprive a person of liberty or property by an arbitrary exercise of power." *Landon Holdings v Grattan Twp*, 257 Mich App 154, 173 (2003); see also Erwin Chermerinsky, *Substantive Due Process*, 15 Touro L Rev 1501, 1501 (1998)("Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose … a good enough reason for such a deprivation.").

A. Retroactive Legislation is Disfavored

As a general rule, there is a presumption against retroactive legislation. *Eastern Enterprises v Apfel, 5*24 US 498, 532-34 (1998) ("Retroactivity is generally disfavored in the law . . .). Specifically, statutes may not be applied retroactively if they abrogate or impair vested rights. *Landgraf v USI Film Prods*, 511 US 244, 268-270, 280 (1994); *In re Certified Questions*, 416 Mich 558, 572 (1982). In determining whether a statute should be applied prospectively or retroactively, the intent of the Legislature is controlling. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583 (2001). As a general rule, statutes and amendments are presumed to operate prospectively unless they are merely remedial or procedural, were adopted to clarify an existing statute and determine a question regarding its meaning, or the Legislature expressly or impliedly indicated an intent to give retroactive effect. *Detroit v Walker*, 445 Mich 682, 704 (1994). A statute that affects substantive rights is not remedial. *Frank W Lynch, supra* at 585. Because there is a presumption against retroactive legislation, the Social Security Act does not generally give the agency the power to promulgate retroactive regulations. *Bowen v Georgetown Univ Hosp*, 488 US 204, 213 (1988).

The controlling case addressing retroactivity is *Landgraf* in which the United States

Supreme Court observed that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* at 265. The Court further stated that there is a presumption against retroactivity because prospectivity "accords with widely held intuitions about how statutes ordinarily operate" and "will generally coincide with legislative and public expectations." *Id.* at 272. However, the Court noted that "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268.

Specifically, the United States Supreme Court observed:

> A statute does not apply "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment. . . ., or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges have "sound . . . instinct[s], . . . and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." [*Id.* at 269-270(internal citations omitted).

In analyzing retroactivity issues, the Court set forth the following framework:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. [*Id.* at 280].

See also *Usery v Turner Elkhorn Mining Co*, 428 US 1, 15 (1976) (holding that due process requires an inquiry into whether the legislature acted in an arbitrary and irrational way in

enacting a retroactive law); *General Motors Corp v Romein*, 503 US 181, 191 (1992) ("Retroactive legislation . . . can deprive citizens of legitimate expectations.").

B. Retroactive Application of the Michigan Medicaid Estate Recovery Program Violates Substantive Due Process.

In *Gorney*, the panel majority found that implementation of the estate recovery program could not be applied retroactively before the estate recovery program was implemented because it "would therefore violate the decedents' rights to due process." (60a). In pertinent part, the majority noted:

> The DHHS did not "implement" the MMERP until it circulated instructions to its employees to begin seeking recovery from estates. This occurred on July 1, 2011, after the CMS approved the plan. However, the DHHS could not "implement" the MMERP before the federal government approved it. The DHHS sought "to give practical effect" to its recovery plan by making it "effective" July 1, 2010. This violated MCL 400.112g(5). [59a].

The panel majority further stated:

> By applying the recovery program retroactively to July 1, 2010, the Legislature deprived individuals of their right to elect whether to accept benefits and encumber their estates, or whether to make alternative healthcare arrangements. The Legislature impinged on the decedents' rights to dispose of their property. Despite that the DHHS does not try to recover until the individual's death, that person's property rights are hampered during his or her life. Between July 1, 2010, and July 1, 2011, the date on which the plan was actually "implement[ed]," the decedents lost the right to choose how to manage their property." Taking their property to recover costs expended between July 1, 2010 and plan implementation would therefore violate the decedents' right to due process. [60a]

The panel majority in *Gorney,* however, erred in determining that the estate recovery statute could be applied retroactively starting on the date of implementation (July 1, 2011).

As already argued, pursuant to substantive due process under the state and federal constitutions, the estate recovery program cannot be retroactively applied against an individual's estate if the individual who received the Medicaid long-term care services had not received actual notice of the estate recovery program in the form of written information clearly and

specifically describing the provisions of the Michigan Medicaid estate recovery program and what actions may be taken against an individual's estate at the time of his or her enrollment in the program. See *Dow, supra*. What is paramount as a matter of constitutional law is the right to preserve and protect one's property during one's lifetime; the estate recovery program does not alter that foundational legal principle. See *In re Shah*, 257 AD2d 275; 694 NYS2d 82 (NY App Div 2 1999) (noting that "[t]he complexities of the Medicaid eligibility rules . . . should [not] blind us to the essential proposition that a man or a woman should normally have the absolute right to do anything that he or she wants to do with his or her assets).

Contrary to the DHHS' contention, an individual's constitutionally protected property rights are not mere inheritance rights that exist as a matter of "legislative grace." Rather, what are at issue here are the individual Medicaid beneficiary's constitutionally protected property rights that preserve his or her assets against unfair overreaching by the State through the retroactive application of the law. See *Landgraf, supra*. Moreover, pursuant to MCL 400.112g(3)(g), the DHHS shall seek approval from the CMS in "[i]mplementing the provisions of section 1396p(b)(3) of title XIX to ensure that the heirs of persons subject to the Michigan medicaid estate recovery program will not be ***unreasonably harmed*** by the provisions of this program." (Emphasis added.). Thus, the Medicaid estate recovery program expressly permits individuals to avail themselves of estate planning in order to protect and preserve their own property from unfair governmental overreach and distribute it in accordance with their wishes.

Here, even the retroactive application of the estate recovery program from the date of implementation gives short shrift to well-entrenched individual property rights and the ability of people to make rationally informed planning decisions at the critical end stage of their lives. See *Eastern Enterprises, supra*, 524 US at 556-57 (Breyer, J. dissenting)("A law that is

fundamentally unfair because of its retroactivity is law which is basically arbitrary."). That is because the retroactive application of the estate recovery program to individuals who did not receive timely and reasonably sufficient notice of the written provisions of the program at the time of their enrollment would nullify the protection of their real and personal property under the Due Process Clause, depriving them of the liberty to act with rational foresight in planning and organizing their end-of-life affairs.[25] At bottom, fundamental fairness requires the preservation of settled expectations relating to an individual's assets and that proper notice be given of the effect of new laws. *Landgraf, supra*, 511 US at 265-266.

Therefore, because the DHHS cannot apply the estate recovery program before an individual has received timely and reasonably sufficient notice in the form of written information describing the provisions of the estate recovery program and what actions may be taken against the individual's estate, the DHHS is barred by substantive due process under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, § 17 of the 1963 Michigan Constitution from retroactively applying the estate recovery program to the Estate of Olive Rasmer in this matter.

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[25] But even assuming *arguendo* that the bare notice provided to Olive Rasmer in her application for redetermination benefits on September 30, 2013 were sufficient for due process purposes, the DHHS could only have retroactively applied the estate recovery program against her Estate beginning on that date, not the date of implementation (July 1, 2011). In other words, estate recovery would have been limited to only six months of Medicaid benefits, not almost three years, and the DHHS would have sought to recover approximately $30,000, not $178,000, from the Estate of Olive Rasmer. Indeed, had Olive Rasmer not sought redetermination benefits on September 30, 2013, the DHHS could not have even commenced any estate recovery against her Estate upon her death.

IV. THE DHHS' ESTATE RECOVERY EFFORTS UNDER MCL 400.112g(4) ARE SUBJECT TO JUDICIAL REVIEW PURSUANT TO 1963 CONST ART 6, § 28 AND THE MICHIGAN ADMINISTRATIVE PROCEDURES ACT ("APA"), MCL 24.306(1), OR THE REVISED JUDICATURE ACT ("RJA"), MCL 600.631.

A. The Standards of Judicial Review of Administrative Agency Decisions

The 1963 Michigan Constitution guarantees review of all administrative decisions that are judicial or quasi-judicial in nature. See generally LeDuc, *Michigan Administrative Law* 8:01-8:21 and 9.01-:52 (2001 ed.) and LeDuc, *Michigan Administrative Law Revised Edition* (8:01 - 8:10 and 9:01- 9:55 (2015 ed.) (providing a thorough analysis of judicial review of agency action). Specifically, Article 6, § 28 of the Michigan Constitution provides in pertinent part:

> All final decisions, findings, ruling and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. . . .

Thus, pursuant Article 6, § 28, the standard of review for a judicial or quasi-judicial administrative agency action is whether it is "'authorized by law'" and whether its factual findings are "'supported by competent, material and substantial evidence on the whole record.'" *Viculin, supra,* 386 Mich at 384, quoting Const 1963, art 6, § 28. Ruling that preclusion of judicial review in unconstitutional when Article 6, § 28 applies, this Court in *Midland Cogeneration Venture Ltd Partnership, supra*, 489 Mich at 97 (2011) held that "the Michigan Constitution guarantees judicial review . . . and this guarantee may not be jettisoned by statute."

In this case, the standard of review for a judicial or quasi-judicial administrative agency action is whether it is "'authorized by law'" and its factual findings are "'supported by competent, material and substantial evidence on the whole record.'" *Viculin, supra*, quoting Const 1963, art

6, § 28; *cf. Luttrell v Dep't of Corrections*, 421 Mich 93 (1984). (stating the deferential standard for review of quasi-legislative administrative agency actions). Further, MCL 24.306 allows for reversal of an agency's decision when a decision or order of the agency is "any of the following":

(a) In violation of the constitution or a statute.

(b) In excess of the statutory authority or jurisdiction of the agency.

(c) Made upon unlawful procedure resulting in material prejudice to a party.

(d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law.

Thus, except where some other scope of review is expressly provided for by statute or the constitution, judicial review of decisions of an administrative agency is limited to determining whether a party's rights have been prejudiced because the agency's decision misapplied substantive or procedural law, was arbitrary, capricious or an abuse of discretion, or was not supported by competent, material, and substantial evidence on the whole record. MCL 24.306(1). Alternatively, where an appeal or other judicial review has not otherwise been provided by law, an appeal from an order or decision of an agency is authorized to the circuit court. MCL 600.631.

B. The DHHS' Cost-Effectiveness Determinations Under MCL 400.112g(4) Are Subject to Judicial Review.

MCL 400.112g(4) provides that the DHHS "shall not seek medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state." In *Gorney,* the Court of Appeals noted that there was "no guidance on the application of MCL 4112g(4)," but that "MCL 400.112j(1) gives the DHHS authority to promulgate rules for [estate recovery]." (56a). *Gorney* further observed that the

"Bridges Administrative Manual, BAM 120, p 7, provides: "Recovery will only be pursued if it is cost-effective to do so as determined by the Department at its sole discretion," yet [t]he Legislature did not direct the DHHS to act 'at its sole discretion' and we located no DHHS publication describing how such determinations are made." (56a).

Although MCL 400.112g(4) is silent about the availability of judicial review, it is important to underscore that MCL 400.112j(1) provides that the DHHS "may promulgate rules for the Michigan medicaid estate recovery program ***according to the administrative procedures act of 1969, 1969 PA 306, MCL 24.01 to 24.328***." (Emphasis added.). As LeDuc explains:

> If the underlying statute is silent or if its review provisions are incomplete . . . then depending on the nature of agency action and whether it is a state or local agency, the APA may control, or it may be subject to the RJA. [*Michigan Administrative Law*, Method and Court of Judicial Review, § 8:04, pp 558-59 (2001 ed.)]

As with any other administrative agency action, the DHHS' decision to pursue estate recovery based upon its determination that the costs of recovery do not exceed the amount of recovery available or that recovery is in the best economic interest of the state is subject to judicial review. Simply put, the DHHS' claim that estate recovery decisions regarding cost effectiveness are unreviewable directly conflicts with the Article 6, § 28 of the Michigan Constitution, MCL 24.306(1) of the Michigan Administrative Procedures Act ("APA"), and/or MCL 600.631 of the Revised Judicature Act ("RJA").

Further, although the DHHS has broad authority to establish policies and procedures in compliance with the Medicaid statute and regulations, "an agency policy is still required to be within the matter covered by the enabling statute, comply with the underlying legislative intent, and not be arbitrary or capricious." *Pyke v Dep't of Social Services*, 182 Mich App 619, 632 (1990). "Although agencies are authorized to interpret the statutes they are charged with administering and enforcing, agencies may not do so by promulgating rules that conflict with the

statutes they purport to interpret." *Chrisdiana v Dept of Comm Health*, 278 Mich App 685, 688 (2008). Thus, the usual rules of deference to agency expertise do not apply here. Simply stated, Medicaid is a federal program, and Congress delegated the statutory power to interpret and apply the rules and regulations to the federal agency, the Centers for Medicare and Medicaid Services (CMS). Here, the role of the DHHS is mostly ministerial in merely implementing the estate recovery program that the Congress created and the CMS constructed for implementation. In short, there is no statutory warrant for the DHHS' unsupported declaration that its cost-effectiveness determinations are within its "sole discretion," and hence unreviewable.

C. The DHHS' Cost-Effectiveness Determinations Must Comply With § 3810E of the CMS' *State Medicaid Manual* By Providing a "Reasonable definition of Cost Effective" and Including "Any Methodology You Use for Determining Cost Effectiveness . . . in Your State Plan."

It bears repeating in this context that federal Medicaid law provides for exemptions from estate recovery where such recovery would create undue hardship.[26] Medicaid guidelines allow for State flexibility in establishing procedures for an undue hardship waiver and also permit States ***not*** to pursue estate recovery collection efforts when it would not be cost-effective. Specifically, § 3810E of the CMS' *State Medicaid Manual* provides in pertinent part:

> E. Adjustment or Recovery Not Cost Effective. – You may waive adjustment or recovery in cases in which it is not cost-effective for you to recover from an individual's estate. The individual does not need to assert undue hardship. You may determine that an undue hardship exists when it would not be cost effective to recover the assistance paid. You may adopt your own reasonable definition of cost effective. However, any methodology you use for determining cost-effectiveness must be included in your State plan. . .[130a] [27]

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[26] Federal law requires "undue hardship" waivers by providing, "The State agency shall establish procedures under which the agency shall waive the application of this subsection [] if such application would work an undue hardship as determined on the basis of criteria established by the Secretary." 42 USC § 1396p(b)(3). "Undue hardship" is not defined in the Medicaid statute.

[27] http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html.

Although § 3810E does not define what constitutes cost effectiveness for the purpose of determining when an undue hardship exists, States are nonetheless required to "adopt your own ***reasonable definition*** of cost effective" and to include "any methodology you use for determining cost effectiveness . . . in your State plan." (Emphasis added.).[28] Because the Michigan Medicaid estate recovery program is subject to federal law and guidelines, it is perforce the case that the DHHS cannot determine cost-effectiveness "at its sole discretion," as it must comply with § 3810E by establishing a "reasonable definition of cost effective" and including "any methodology [] use[d] for determining cost-effectiveness."

Finally, cost-effective determinations are not solely at the DHHS' discretion but are subject to judicial review to determine whether the DHHS' application of its definition of "cost effectiveness" is "reasonable," as required by the § 3810E of the CMS' *State Medicaid Manual*. The underlying principle of compliance with the standards set by the federal agency was recognized by the Fourth Circuit Court in *West Virginia v Thompson*, 475 F3d 204 (CA4 2007) in affirming the United States Department of Health and Human Services' determination that West Virginia's definition of hardship waiver was overbroad. In that case, the Fourth Circuit found that the Secretary did not act arbitrarily or capriciously, or interpret the statute in an unreasonable fashion, in disapproving of West Virginia's proposed undue hardship waiver as "so broad that it would serve not as an exception to estate recovery for hardship cases but as a means

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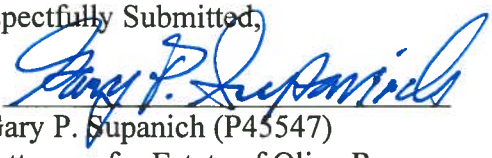
[28] In 2011, the Michigan Medicaid State Plan addressing recovery defined "cost effectiveness" to be ". . . when the potential recovery amount of the estate exceeds the cost of filing the claim and any legal work dealing with the claim." (131a). Subsequently, the 2012 amendment states that it is cost effective ". . . when the potential recovery amount of the estate exceeds the cost of filing the claim and any legal work dealing with the claim, or if the recovery amount is above a $1,000 threshold." (132a). The 2016 amendment now states that cost effectiveness is ". . . when the potential recovery amount of the estate exceeds the cost of filing the claim or if the claim is above a $1,000 threshold." (133a).

of unraveling the estate recovery mandate itself." *Id.* at 213.[29] Similarly, the DHHS' cost-effective determinations about estate recovery are also subject to judicial review in conformity with 42 USC § 1396p(b)(3) and § 3810E of the CMS' *State Medicaid Manual*.

CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing, this Court should reverse Court of Appeals' decision in *In re Estate of Gorney* as to the Estate of Olive Rasmer and reinstate the probate court's decision granting the Estate's motion for summary disposition under MCR 2.116(C)(10), denying the DHHS' claim seeking estate recovery in the amount of $178,133.021.

Respectfully Submitted,

By: 

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[29] The Fourth Circuit applied the standard of review in the Administrative Procedures Act, stating that a court shall "set aside agency action, findings, and conclusions' when they are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 USC § 706(2)(2000). A court shall also set aside agency actions 'in excess of statutory jurisdiction, authority, or limitations short of statutory right' as well as actions 'without observance of procedure required by law.'" *Id.* § 706(2)(C)-(D). In *West Virginia v Thompson,* the Fourth Circuit underscored that States are authorized "to establish procedures to waive estate recovery only 'if such application would not work an undue hardship as determined '*on the basis of criteria established by the Secretary.*' 42 USC § 1396p(b)(3)." *Id.* at 214 (emphasis in original).